Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	
Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	)	**WC Docket No. 03-251**

COMMENTS OF AT&T CORP. AND THE COMPTEL/ASCENT ALLIANCE

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Pursuant to the Commission's *Public Notice*,[1] AT&T Corp. ("AT&T") and the CompTel/ASCENT Alliance ("CompTel") respectfully submit these comments on BellSouth's "Emergency Request for a Declaratory Ruling."

INTRODUCTION AND SUMMARY

BellSouth seeks "emergency" relief against a series of state utility commission orders that have enjoined BellSouth from engaging in blatantly anticompetitive practices that have prevented competition with BellSouth's monopoly *intrastate* retail voice telephone services. States have express authority under § 2(b) of the Act and under their police powers to regulate competition in these services. And there is absolutely no conflict between the state orders and the Commission's *Triennial Review Order* or any of the Commission's regulations governing interstate or information services. There is no "emergency" and no basis for the Commission to

[1] *See Public Notice, Pleading Cycle Established for Comments on BellSouth's Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Such Services to CLEC Voice Customers*, WC Docket No. 03-251 (Dec. 16, 2003); *Order*, WC Docket No. 03-251 (Dec. 30, 2003).

take the extraordinary step of sanctioning anticompetitive conduct that states have reasonably condemned.

The state orders at issue have enjoined BellSouth practices that have the purpose and effect of preventing competition with BellSouth *intrastate* retail local voice services and of maintaining BellSouth's monopoly over these services. In particular, because BellSouth has a large installed base of customers who are locked into BellSouth's "FastAccess" DSL Internet Access Service, BellSouth has refused to continue to provide this service to customers who switch to a CLEC that provides local voice service using UNE-P or UNE-L arrangements (customers' adoption of VoIP service would similarly be restricted). As senior BellSouth executives have candidly told analysts, BellSouth adopted this practice precisely because it creates "a huge disincentive for customers to use a CLEC for voice if they are not able to use our DSL service," and the effect of the practice is to foreclose CLECs from offering competitive voice services to much, and perhaps all, of this large base of BellSouth DSL customers.

As the state commissions have found, there is no technological or legitimate business reason for BellSouth's practice – as is demonstrated by the fact that one of the Bells (Qwest) does provide DSL service to customers who switch their voice service to a CLEC. By disconnecting DSL service to any customer that switches its voice service, BellSouth is engaged in a blatant sacrifice of short-run profits in order to protect its local voice monopoly, and BellSouth's practice has had profound anticompetitive effects, as the state commissions have found.

The assertion that state commissions have no jurisdiction over these issues is complete nonsense. They have plenary authority – under § 2(b) of the Act and under their general police powers – to regulate competition in intrastate retail local voice services. Just as states may apply their antitrust laws to prevent conduct that lessens competition in these markets, so too may state commissions exercise their independent jurisdiction over intrastate services to adopt rules and regulations to promote competition in these markets and to prevent conduct that is found to maintain a monopoly.

Nonetheless, BellSouth has advanced a laundry list of claims that the orders restricting its anticompetitive practices are preempted. None possesses the slightest substance.

BellSouth's primary reliance is on the dictum in the *Triennial Review Order* that it is "unlikely" that states can impose unbundling obligations where the FCC has declined to do so. But the state orders at issue here impose *no* unbundling obligations. Contrary to BellSouth's claim, the state orders did not order BellSouth to unbundle the low frequency part of its loops. CLECs in each of these states obtain the entire loop, pay BellSouth the full forward-looking cost of providing the entire loop, and will allow BellSouth (at no charge) to continue providing DSL service over the loop – which is precisely the type of commercial arrangement that the *Triennial Review Order* expressly held to be permitted. BellSouth's refusal to enter into this arrangement is conduct that maintains its local voice monopoly and that serves no legitimate business purpose, and states are therefore absolutely free to enjoin it. In this latter regard, there is nothing in the *Triennial Review Order* that remotely authorizes what BellSouth has done.

Next, BellSouth notes that wholesale DSL service is jurisdictionally interstate (under the "contamination" rule that makes a service interstate if its usage is over 10% interstate) and that retail DSL service is an information service. BellSouth contends that it follows that states have no authority to adopt regulations that incidentally affect DSL services in order to protect local voice competition. That is just wrong. Although the FCC has jurisdiction over services that have significant interstate usage, states are free to adopt rules regulating intrastate aspects of interstate or information services unless the state rules would negate an explicit FCC policy governing the interstate applications of the service. Here, nothing that the state commissions have ordered has in any way interfered with any federal policy governing DSL services. There simply is no federal policy of allowing incumbent LECs to use control over these services anticompetitively to foreclose local intrastate voice competition.

BellSouth next invokes the filed tariff doctrine, which is wholly inapplicable. The state orders primarily affect BellSouth's retail "FastAccess," which is an *untariffed* information service to which the filed tariff doctrine has no conceivable application. And as noted, states retain plenary authority to prevent BellSouth from using its control over "locked-in" customers of this service to block competition in local voice service. The state order that affects BellSouth's wholesale DSL service, which is tariffed, does so in ways that do not even trigger the filed tariff doctrine. BellSouth can point to no language in its tariff that conflicts with state-law restrictions on its marketing practices, and restricting BellSouth from refusing to provide service to customers it was all too happy to serve until they chose a rival for voice service in no way increases BellSouth's cost of providing the tariffed service.

Finally, it is extraordinary that BellSouth would claim that there is a basis for "emergency" relief from the Commission. BellSouth is asking this Commission to use its discretionary authority to issue a declaratory ruling to sanction blatantly anticompetitive conduct that states have exercised explicit jurisdiction to condemn – in orders that are reviewable in federal court and that have been upheld by the one federal court that has concluded review. Whether viewed through a legal, equitable, or policy lens, that would be palpably improper.[2]

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[2] For the reasons provided in the Joint Comments of the United States Department of Justice, the Federal Bureau of Investigation, and the United States Drug Enforcement Administration, at 3-4,

ARGUMENT

I. THE STATE ORDERS AT ISSUE PROPERLY ADDRESS A SIGNIFICANT ANTICOMPETITIVE PRACTICE.

BellSouth seeks to have the Commission preempt a series of state orders that directly further the paramount Commission objective of fostering local telephone competition. All of these state orders principally restrict BellSouth's "current practice to discontinue FastAccess [Internet] service to those customers who migrate their local voice service from BellSouth to a CLEC where the CLEC provides local voice service using UNE-P or UNE-L."[3] Each PSC found that BellSouth's practice "prevents the CLECs from being treated fairly by erecting barriers to [local telephone] competition" and "impedes competition by limiting the range of consumer choice."[4] After extensive evidentiary proceedings, each state PSC found that the record amply

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WC Docket No. 03-251 (Jan. 15, 2004), the pendency of ongoing proceedings addressing related issues provides an additional basis for denying BellSouth's petition.

[3] *Complaint of Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. Regarding BellSouth's Practice of Refusing to Provide FastAccess Internet Service To Customers Who Receive Voice Service From A Competitive Voice Providers, And Request For Expedited Relief*, Docket No. 020507-TL, at 18 (Fla. PSC Nov. 20, 2003) ("*Florida PSC Staff Recommendation*"); *see also, e.g., Petition of Cinergy Communications Co. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Case No. 2001-00432, at 8 (Ky. PSC July 12, 2002) ("*Kentucky PSC Order*") ("BellSouth shall not refuse to provide its DSL service to a customer on the basis that the customer receives voice service from a CLEC that provides service by means of UNE-P."), *aff'd BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, No. CIV.A.03-23-JMH, __ F. Supp. 2d __, 2003 WL 23139419 (E.D. Ky. Dec. 29, 2003); *In re Petition by FDN, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Order No. PSC-02-0765-FOF-TP, at 11 (Fla. PSC June 5, 2002) ("*Florida PSC FDN Order*") ("BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops").

[4] *Florida PSC Staff Recommendation*, No. 020507-TL, at 20; *see also Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No.

supported the conclusion that BellSouth's restriction on its DSL service was without commercial justification and had the effect of impeding competition in local telephone markets.[5]

The record in the state proceedings consistently revealed two principal types of anticompetitive conduct. The first is the "lock-in" effect on BellSouth voice telephone customers created by the very significant burdens that BellSouth's restrictive policy imposed on customers who considered purchasing or sought to purchase their local telephone service from a CLEC.[6]

11901-U, at 16 (Ga. PSC Oct. 21, 2003) ("*Georgia PSC Order*") (BellSouth's policy of refusing DSL service to CLEC voice customers harms customers and "insulates BellSouth's voice service from competition because customers that would like to switch to a preferred CLEC for voice service have a disincentive to do so"); *Kentucky PSC Order*, No. 2001-00432, at 7 (BellSouth's "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers"); *Florida PSC FDN Order*, No. PSC-02-0765-FOF-TP, at 11 (BellSouth's practice "creates a barrier to competition in the local telecommunications market in that customers could be dissuaded by this practice from choosing FDN or another ALEC as their voice service provider"); *id.* at 10 (finding BellSouth's tying practice has a "direct, harmful impact on the competitive provision of telecommunications services"); *In re BellSouth's provision of ADSL Service to end-users over CLEC loops*, Order R-26173, at 5 (La. PSC Jan. 24, 2003) ("*Louisiana PSC Order*") ("BellSouth's policy of refusing to provide its DSL service over CLEC voice loops is clearly at odds with the Commission's policy to encourage competition.").

[5] *See, e.g.*, *Cinergy*, 2003 WL 2313941, at *7 ("Cinergy offered voluminous testimony describing BellSouth's anticompetitive practices and explaining how they would cripple Cinergy's ability to compete in the local voice market."); *Georgia PSC Order*, No. 11901-U, at 16-17 (summarizing evidence of anticompetitive effect by MCI and CUC); *Florida PSC Staff Recommendation*, No. 020507-TL, at 21-27, 42-47, 56-61 (summarizing evidence of anticompetitive effect).

[6] As summarized in the Georgia proceedings, "switching out of BellSouth's DSL service to another mode of high speed Internet service would require 'disconnecting FastAccess service, obtaining a different DSL modem, and probably having to pay early termination fees.'" *Georgia PSC Order*, No. 11901-U, at 16 (quoting MCI witness Sherry Lichtenberg); *see also Florida Staff Recommendation*, No. 020507-TL, at 55 ("the customer must disconnect his FastAccess, obtain a different DSL modem, and likely change his e-mail address") (citing Tr. at 167). The evidence also showed that "the customer would have to establish broadband service with a different provider, incur any connection fees, change his or her email address, and notify his or her contacts of that change." *Georgia PSC Order*, No. 11901-U, at 16 (citing Tr. at 25).

The anticompetitive implications of this lock-in effect are comparable to those that the Commission has found to justify, for example, its local number portability and wireless number portability requirements. *See First Number Portability Order*, 11 FCC Rcd. 8352, 8368, ¶¶ 30-31 (1996); *Third Number Portability Order*, 13 FCC Rcd. 11,701 (1998).[7] The evidence before the state commissions showed that the most significant burden imposed upon customers, including small business customers, was disruption in e-mail communication and Internet access for a potentially significant period. Other burdens included reestablishing formats, support, and passwords for web pages and Internet-provided services and, for the majority of customers who overcame the often trying process of self-installing their original DSL service, facing the prospect of having to repeat that unpleasant process. *See Florida PSC Staff Recommendation*, No. 020507-TL, at 23 (citing Tr. at 55).[8]

The state PSCs confirmed that these burdens, real and perceived, led to a "lock-in" effect that was nearly complete and that "it is difficult for a CLEC to entice a customer away from BellSouth once that customer has FastAccess." *Florida PSC Staff Recommendation*, No. 020507-TL, at 46. The Florida PSC Staff concluded from the witness testimony "that [BellSouth's] practice effectively keeps customers from switching" and that "BellSouth

[7] In the related context of telephone numbers, the D.C. Circuit recently held that "[t]he simple truth is that having to change phone numbers presents a barrier to switching carriers, even if not a total barrier, since consumers cannot compare and choose between various service plans and options as efficiently." *Cellular Telecomm. & Internet Assoc. v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003).

[8] For all BellSouth voice customers that also have BellSouth DSL service, BellSouth's practice can force "the buyer into the purchase of a tied product that the buyer . . . might have preferred to purchase elsewhere on different terms," *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), because of high switching costs for DSL. *See, e.g.*, Department of Justice, *Horizontal Merger Guidelines* § 1.12 (rev. Apr. 8, 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (last visited Jan. 30, 2004); *see also Eastman Kodak Co. v.*

adopt[ed] its practice to keep customers from switching voice service." *Id.* at 45. As the Georgia PSC concluded, BellSouth uses the anticompetitive arrangement to "insulate [its] voice service from competition because customers that would like to switch to a preferred CLEC for voice service have a disincentive to do so." *Georgia PSC Order*, No. 11901-U, at 16. Testimony from carrier after carrier supported these conclusions that customers, especially small business customers, were unwilling to consider another voice provider when they believed that switching from BellSouth's service might lead to a disruption in their email communications and Internet access.[9] As a senior BellSouth representative told an equity market analyst in reference to the state orders it challenges here: "Essentially, it's a huge disincentive for customers to use a CLEC for voice if they are not able to use our DSL service."[10] The Bells' CEOs have also boasted of the impediments to voice competition posed by their DSL bundling practices.[11]

Image Technical Servs., Inc., 504 U.S. 451, 476 (1992) (market power often present where customers "locked" into a product because of high "switching" costs).

[9] *See, e.g.*, FDN Answer Br., *BellSouth Telecomms., Inc. v. FDN, Inc.*, No. 4:03 CV 212-RH/WCS, at 32-36 (filed Nov. 7, 2003) (summarizing record evidence); Florida PSC Answer Br., *FDN, Inc.*, No. 4:03 CV 212-RH/WCS, at 31-34 (filed Nov. 7, 2003); MCI's Post-Hearing Br., *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 11901-U, at , at 8-10, 12-16 (filed Apr. 11, 2003); Cinergy Br., *Cinergy*, at 36-38 (filed Aug. 15, 2003); *Amici* Br. of AT&T Corp. and MCImetro Access Transmission Services, *Cinergy*, at 23-25 (filed Aug. 15, 2003).

[10] Medley Global Advisors, Equity Brief, *BellSouth: DSL/Voice Bundling Faces Regulatory Obstacles*, at 3 (Jan. 14, 2004) ("Medley Global Advisors").

[11] SBC's Chairman and CEO Edward Whitacre recently stated, "The [customer retention] save rates on DSL, when you start bundling these things, is quite dramatic. You cut down the [local] churn a great deal ... as much as 70 percent." Smith Barney Citigroup's Entertainment, Media ; *SBC Communications 2003 Q4 Conference*, Fin. Disclosure Wire (Jan. 6, 2004), *available at* 2004 WL 65931361; *id.* ("we've also strengthened our bundle through the use or through growth in DSL"); *id.* ("At the start of last year, 19 percent of our consumer retail lines had a bundle with one of our key services, key services being long distance, DSL or wireless. By the end of the year, we had more than doubled that, and we expect bundled growth to continue strong in

The state proceedings also established that BellSouth's practice has a material detrimental effect on competition. BellSouth's DSL service is delivered to approximately 1.46 million households, as of December 31, 2003. BellSouth's share is rapidly increasing, with BellSouth adding 126,000 net new DSL customers in the last quarter alone. Even when BellSouth's DSL service was much less developed, the anticompetitive effect on CLECs was extensive. The proceedings showed that more than 4,900 Georgia customers had declined its service over less than nine months only because they did not wish to have their BellSouth DSL service disconnected. *See* MCI's Post-Hearing Br., *Georgia PSC Order,* No. 11901-U, at 9 (filed Apr. 11, 2003) (citing Tr. at 38-39, 75). AT&T's own experience also shows that restrictions such as BellSouth's are very material. In November of 2003 alone, 1,700 Bell residential customers indicated that they would not switch to AT&T's voice service because they would lose their current Bell DSL service, and this figure excludes business customers, as well as the many customers who gave no reason to a customer service representative or who did not contact a service representative at all simply because they knew they would lose their Bell DSL service. *See* Declaration of Sarah DeYoung, at ¶ 8 (Attachment A).

The second aspect of BellSouth's practice addressed in the state proceedings concerned its effect on customers who wished to have DSL service but received voice service from a BellSouth competitor. Here, the state commissions found that BellSouth's practice of bundling its telephone and DSL services impeded local telephone competition where the CLEC could not provide an alternative DSL service.[12] In those circumstances, a customer that would have

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2004."); *see also Q3 Verizon Earnings Conference Call*, Fin. Disclosure Wire (Oct. 28, 2003), *available at* 2003 WL 62799035

[12] Indeed, the Bells have openly acknowledged that this is the very reason that it has tied its DSL and voice services together. *See* Verizon Br., at 19, *Greco v. Verizon Communications, Inc.*,

otherwise selected the CLEC telephone service over BellSouth's telephone service instead chose or retained its BellSouth voice service in order to obtain DSL service. Given the limited availability of line splitting and the limited range of competitive DSL service provision, there are many circumstances where BellSouth is the only available DSL provider. As the Florida PSC found, "Although, BellSouth claims that the CLECs have options for providing their own DSL service, it is clear from the record, that as a practical matter, these are not reasonable, viable options." *Florida Staff Recommendation*, No. 020507-TL, at 44.[13] Many DSL providers have gone bankrupt, and the remaining few with broadly available offerings nevertheless do not serve many areas and are constrained in their ability to roll out services.

Both types of competitive harms reflect the clearest indicia of an anticompetitive practice: a monopolist foregoing earnings (or otherwise incurring costs) in order to create barriers to entry into its core market. This type of conduct has been repeatedly condemned as anticompetitive and harming consumer welfare.[14] And the fact that BellSouth is refusing to deal with *customers* that would deal with BellSouth's competitors raises even greater concerns. Where "a monopolist refuses to deal with customers who deal with its rivals," such "behavior is inherently anticompetitive [and] . . . is illegal." *Byars v. Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir.

Case No. 03 Civ. 0718 (KMW) (by refusing to sell DSL to customers of competitive carriers, [a Bell] "differentiates" itself from and gains an "advantage" over those carriers who can "not offer [DSL services] to their[]" customers).

[13] *See also Georgia PSC Order*, No. 11901-U, at 7-8, 17 (finding alternatives such as resale, cable modems, CLEC DSL service and line splitting effectively unavailable, and that "the alternatives to BellSouth's DSL service do not substantially diminish the anticompetitive impact of BellSouth's policy on local voice competition").

[14] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985) (finding Aspen Skiing violated the Sherman Act when it gave up "short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rivals"); *see also Jefferson*

1979) (summarizing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and its progeny). This is also the view of the leading antitrust commentators:

> Extraction of an agreement not to deal with any competitor – or the equivalent, refusing to deal with buyers who do – can be exclusionary and particularly damaging where the buyers cannot do without the seller's product or service. We see no convincing justification for a requirement that a customer not deal with a particular rival.

IIIA Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 768e6 (1996).

For both types of competitive harm, the state proceedings also established that BellSouth has no legitimate competitive justification for its practice. One of the most striking aspects of its "Emergency Petition" is that BellSouth still is unable to proffer, much less provide evidence for, any legitimate basis for its practice. BellSouth's petition does not offer a single reason why its requested relief is consistent with the Act's stated policy goal of "promot[ing] competition . . . in order to secure lower prices and higher quality services for American telecommunications consumers." Preamble, 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (1996); *see also Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002) (the Act is "designed to give aspiring competitors every possible incentive to enter local retail telephone markets").

The Louisiana PSC expressed bafflement that BellSouth attempted to defend its practice by instead "argu[ing] that the Commission should make inquiries relative to the investments, personnel and taxes CLECs have made in Louisiana before it makes a decision." *Louisiana PSC Order*, No. R-26173, at 6. And as the Florida PSC noted, BellSouth "states that there is *no* profit margin at which it would offer FastAccess service [to CLEC voice customers] and that it would rather lose the customer than provide FastAccess." *Florida Staff Recommendation*, No. 020507-TL, at 24 (citing Florida Competitive Carrier's Association Br. at Ex. 7; BellSouth Response to

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Parish Hosp. Dist. No. 2, 466 U.S. at 14 (tying two products can "create barriers to entry of new

Staff's Interrogatory No. 28) (emphasis added). In other words, BellSouth would rather let valuable assets lay fallow than use them to provide highly profitable services to willing customers. This strategy can only be rational if it is anticompetitive – *i.e.*, if BellSouth's practice will prevent a sizeable percentage of those customers from actually switching to competitive carriers for voice services. Otherwise, all BellSouth has done is to stop providing an otherwise profitable service – indeed, a service that BellSouth claims to have invested billions of dollars to provide.

After considerable investigation, the state PSCs rejected as unsupported BellSouth's claims that technological limitations justified its restrictive policies.[15] Qwest's provision of its DSL service to UNE-P customers supports this conclusion,[16] and BellSouth presumably will begin to follow suit once it completes its forum-shopping and complies with the state orders.[17] The commissions also noted, among other conclusions, that BellSouth was perfectly content to provide its FastAccess service to customers served by a CLEC's voice service delivered via

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competitors in the market for the tied product").

[15] *See, e.g.*, *Florida PSC Staff Recommendation*, No. 020507-TL, at 56-61; Rebuttal Test. of Sherry Lichtenberg, *Florida PSC Staff Recommendation*, No. 010507-TL, at 5-9 (filed Dec. 23, 2002); *Georgia PSC Order*, No. 11901-U, at 8-9; MCI's Post-Hearing Br., *Georgia PSC Order*, No. 11901-U, at 27-31; *Florida PSC FDN Order*, No. PSC-02-0765-FOF-TP, at 5-8.

[16] Through interconnection agreements with AT&T, Qwest has agreed that the "CLEC may convert existing Qwest retail service with existing Qwest DSL to UNE-P services with Qwest DSL service, without an interruption in service due to the conversion. CLEC may also request the installation of new Qwest DSL service on existing UNE-P service, subject to Loop qualification and availability." Colorado Interconnection Agreement, AT&T Communications of the Mountain States, Inc. and Qwest Corp., §§ 9.21.2.1.8.2 (filed Jan. 12, 2004).

[17] As summarized in the Declaration of Sarah DeYoung (Attachment A), BellSouth has not yet conformed its DSL practices to the state commission requirements in Florida, Kentucky, Louisiana, and Georgia. According to a market analysis service, "BellSouth lobbyists say they will not comply with state orders on unbundling until the FCC rules on their petition." Medley Global Advisors, at 3.

resale, rather than UNE-P. Resale, of course, poses a far less threatening competitive threat, and much larger margin, for BellSouth.

In sum, BellSouth has restricted its DSL service solely to maintain its local telephone monopoly. As the state commissions found, BellSouth's anticompetitive actions with regard to its FastAccess have locked in BellSouth voice customers, imposed barriers to CLEC voice service, and shielded a significant portion of the Bell customer base from effective telephone competition. The state commissions reached these conclusions based on very extensive evidence, and, as detailed below, their actions are fully consistent their own broad state-law authority and with the 1996 Act, the Commission's decisions, and the core objective of removing barriers to local telephone competition.

II. THE STATES HAVE AMPLE AUTHORITY TO RESTRICT BELLSOUTH'S ANTICOMPETITIVE MARKETING PRACTICES.

The state commissions' orders amounted to the simple command that BellSouth not turn off a customer's DSL service if that customer sought to purchase local telephone service from one of BellSouth's competitors. Contrary to BellSouth's claims (at 25-26, 29) regarding the limits of state powers, the state commissions' authority derived from two independent sources: their undisputed power to regulate the competitive conditions surrounding local telephone service, and their clear power to regulate a "jurisdictionally mixed" service such as DSL that transmits both intrastate and interstate communications.

First, the state orders that BellSouth challenges reflect a straightforward exercise of the states' power to regulate competition in local telephone services. The orders sought to prevent, for example, "the anticompetitive effect BellSouth's practice has on CLEC voice customers in violation of relevant LPSC, as well as FCC, rules and regulations, by restraining voice competition." *Louisiana PSC Order,* No. R-26173 at 6. Preventing BellSouth from discontinuing DSL service was, for this purpose, no different from an order prohibiting BellSouth from imposing any other charge, cost, or inconvenience on a customer that sought to switch its voice service from BellSouth to a competitor. Subject to §§ 251-252, a state commission has clear and exclusive authority over local telephone service and the conditions limiting competition in the service. *See* 47 U.S.C. § 152(b). Sections 251-252, and the federal Communications Act, clearly preserve the commissions' authority to foster local competition in this fashion.[18] Even BellSouth does not argue that the Act expressly limits the state actions at issue, and, as discussed below, no inconsistency between federal and state requirements exists that would support a finding of preemption.

BellSouth's challenge is, however, based on a far too constrained conception of state power over local telephone competition. Congress in enacting the 1996 Act noted with approval ongoing state efforts to "open the local networks of telephone companies," S. Rep. No. 104-23, at 5 (1995), and endeavored to build on them – not kill them. As the FCC put it in one of its first orders construing the statute, the Act did not "intend to disrupt the pro-competitive actions some states already ha[d] taken" or that other states would take. First Report & Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd.

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[18] *See* 47 U.S.C. §§ 251(d)(3) ("Preservation of State access regulations"); *id.* § 252(e)(3) ("Preservation of authority": "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement"); *id.* § 261(b) (preservation of state regulatory powers to fulfill requirements of local competition requirements); *id.* § 261(c) (no preclusion of state regulation "for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part"); 1996 Act, § 601(c), 110 Stat. at 14 (1996 Act "shall not be construed to modify, impair, or supersede Federal, *State*, or local law unless *expressly so provided* in such Act or amendments") (uncodified note to 47 U.S.C. § 152).

15499, ¶ 62 (1996) ("*Local Competition Order*"). This intent is clearly evinced by not only the structure of the Act but also by the explicit savings clauses that safeguard state authority. *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c); Act § 601(c)(1), 110 Stat. 56, 143 (1996) (uncodified note to 47 U.S.C. § 152).

Under the 1996 Act, state utility commissions comprise the front lines of the battle to create competition in the provision of local telephone service. Apart from the states' exercise of delegated federal power, the states exercise their own powers over local telephone competition. Specifically, Congress stated that "notwithstanding" the limited federal standards in section 252(e)(2) for rejecting negotiated and arbitrated interconnection agreements, "nothing in this section [252] shall prohibit a State commission from establishing or enforcing other requirements of *State* law in its review of an agreement." *Id.* § 252(e)(3) (emphasis added). Congress preserved this authority with one qualification: the state commission may enforce or establish state law requirements "subject to section 253 of this title," *id.*, which prohibits states from imposing legal requirements that create barriers to competitive entry. Thus, so long as it does not invoke state law to create barriers to entry in violation of section 253 of the Act, a state may exercise its inherent sovereign power to regulate intrastate facilities and services. The three other savings clauses Congress included in the Act confirm congressional intent broadly to preserve state sovereign authority to promote local telephone competition.[19]

[19] Sections 252 and 253 expressly preserve the states' ability to impose state-law requirements (other than those that erect barriers to entry) when reviewing interconnection agreements. Section 251(d)(3), entitled "Preservation of State access regulations" bars the Commission from "prescribing" or "enforcing" regulations under section 251 that "preclude the enforcement of any regulation, order, or policy of a State," so long as those state measures are "consistent with the requirements of this section [251]," § 251(d)(3)(B), and do "not substantially prevent implementation of the requirements of this section and the purposes of this part [of the Act]," § 251(d)(3)(C). Section 261(c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary

Second, even if the state commissions' power over local telephone service were not sufficient (and it is), the commission orders are authorized by the states' power over the intrastate communications component of DSL services in the absence of a direct conflict with federal regulation. Much (if not most) of DSL-based communications are *intrastate* communications: web browsing often involves a communication between an end user and a local server that stores downloaded (or "cached") website information; many websites accessed directly by customers are located within the consumer's state; and all DSL calls are initiated by a communication to a local server. DSL service also consists of communications to out-of-state websites, and for this reason it is "jurisdictionally mixed" – that is, it combines intrastate and interstate communications – as the Commission has concluded.[20]

BellSouth argues (at 25-26, 29) that state commissions lack authority to regulate interstate services, but this observation is entirely incorrect as applied to the "jurisdictionally mixed" services at issue here. For such jurisdictionally mixed services, the state has power to regulate the entire service unless that regulation "negates the exercise by the FCC" of its lawful powers. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 428-29 (D.C. Cir. 1989)

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to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." Finally, in section 601(c)(1) of the Act, Congress provided courts with a special rule of construction in interpreting the Act so as to preserve state authority. Congress specified that the "Act shall not be construed to modify, impair, or supersede . . . State[] or local law unless expressly so provided." Act § 601(c)(1), 110 Stat. at 143. Congress included this clause to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." H.R. Conf. Rep. No. 104-458, at 201, *reprinted in* 1996 U.S.C.C.A.N. at 215.

[20] *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, 9160, ¶¶ 14, 52 & nn.97-98 (2001); *see also Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (affirming FCC's determination that ISP-bound traffic is jurisdictionally mixed).

("*NARUC*"); *see also, e.g.*, *Louisiana PSC v. FCC*, 476 U.S. 355, 360 (1986); *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) ("*California II*"); *California v. FCC*, 905 F.2d 1217, 1241-43 (9th Cir. 1990) ("*California I*"); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977). The Supreme Court and courts of appeals have squarely rejected BellSouth's argument that when a jurisdictionally mixed service has an interstate component, only the Commission can regulate in a manner that affects the interstate service. Sections 1 and 2(b) of the Communications Act empower the Commission to regulate services that include interstate communications, without providing that such regulation is exclusive, and preserve states' exclusive authority to regulate intrastate communications. 47 U.S.C. §§ 151 & 152(b). In rejecting the same argument BellSouth makes here, the Supreme Court explained that the Commission does not have "plenary" authority just because it is regulating interstate communications, because "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities." *Louisiana PSC*, 476 U.S. at 360; *see also, e.g.*, *California II*, 39 F.3d at 931-32; *California I*, 905 F.2d at 1241-43; *NARUC*, 880 F.2d at 428-29; *North Carolina Utils. Comm'n*, 552 F.2d at 1043. "In reality, since most aspects of the communications field have overlapping interstate and intrastate components, these two sections do not create a simple division [of authority]; rather they create persistent jurisdictional tension." *Public Util. Comm'n v. FCC*, 886 F.2d 1325, 1329 (D.C. Cir. 1989).

In resolving this jurisdictional tension, "the *only* limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." *NARUC*, 880 F.2d at 429. Indeed, the Commission can preempt state regulation only when "it can show that the state regulation negates a valid federal policy" and "only to the degree necessary to achieve it." *NARUC*, 880 F.2d at 430-31 (emphasis omitted); *see also California II*, 39 F.3d at 931-32. And even the Commission's exercise of its express preemption power in such circumstances does not preclude all state regulation, but only state regulation "inconsistent" or "conflict[ing]" with the "valid federal regulatory objective." *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989); *see Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 434-36 (6th Cir. 2003). As discussed below, the state commissions' orders do not "negate" either any exercise of the Commission's authority over interstate communications or any valid federal policy established through a preemption order.

Indeed, the Commission itself and the courts of appeals have repeatedly rejected the core of BellSouth's claim. The Commission has found that traffic delivered to an Internet service provider, including traffic over a DSL service, is "jurisdictionally mixed" traffic for which it declined to exercise its preemption power (pending implementation of a governing federal rule) and initially determined that states would continue to set charges – for both intrastate and interstate traffic. *See ISP Order*, 14 FCC Rcd. 3689, ¶¶ 26-27 (1999). Similarly, the Fifth Circuit considered and rejected a claim by SBC that is indistinguishable from BellSouth's claims here. SBC had argued that "because Internet traffic is interstate, as a matter of federal law state commissions such as the PUC lack jurisdiction" to regulate rates for their traffic. *Southwestern Bell*, 208 F.3d at 480; *see also Michigan Bell*, 339 F.3d at 434-36. The Fifth Circuit applied *Louisiana PSC*, noted that decision's treatment of jurisdictionally mixed traffic, and held that the FCC did not have "plenary authority" over the interstate traffic. *Id.* It further held that the PUC "properly exercised its jurisdiction" in a manner that affected both interstate and intrastate Internet traffic, "regardless of any interstate aspect of the subject telecommunications." *Id.*

III. THE STATE REQUIREMENTS CONFLICT WITH NO FEDERAL LAW, NEGATE NO FEDERAL POLICY, AND ARE NOT PREEMPTED.

Despite these clear legal standards and the heavy burden imposed against preemption by the savings clauses contained in the Communications Act,[21] BellSouth argues that the state commissions' orders are pre-empted for three additional reasons: (i) because the state orders are pre-empted by the Commission's *Triennial Review Order*; (ii) because the Commission's preemption determinations related to common carrier tariff regulation of enhanced services apply to the state orders; and (iii) because the state orders are inconsistent with tariffing requirements that exist in relation to the services at issue. As shown below, these claims are entirely without merit. Initially, BellSouth points to nothing in them that "negates the exercise by the FCC of its own lawful authority over interstate communication." *NARUC*, 880 F.2d at 429; *see supra* 17-19. Nor does it show any inconsistency between federal and state law. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (federal and state laws are not inconsistent so long as it is "possible to comply with state law without triggering federal enforcement action").

For similar reasons, no basis exists for the Commission to exercise any discretion it may have to preempt the state orders. BellSouth's petition seeks only a declaration that the state orders are already preempted, and this is clearly not so. Although the Commission may in limited circumstances preempt state regulatory authority over "jurisdictionally mixed" telecommunications, it is not *required* to do so, and in the absence of FCC preemption, states are free to regulate jurisdictionally mixed telecommunications traffic, as well as the facilities used to

[21] *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent").

transmit that traffic. *See Southwestern Bell*, 153 F.2d at 542 (rejecting argument that FCC's decision not to preempt state regulation of jurisdictionally mixed service "amounts to a dereliction of the [FCC's] obligation to retain exclusive jurisdiction over interstate communications and forces state regulatory commissions to overstep their authority"); *Diamond Int'l Corp. v. FCC*, 627 F.2d 489, 492-93 (D.C. Cir. 1980) (affirming state commission jurisdiction over equipment "which necessarily serves both interstate and intrastate communications"); *Southwestern Bell*, 208 F.3d at 480 (rejecting argument that FCC preempted all regulation of Internet traffic based on its interstate component); *US West Communications v. MFS Intelnet, Inc.*, 193 F.3d 1112, 1122-23 (9th Cir. 1999). As in the many other cases in which the Commission has declined to preempt state powers where the FCC and state authority overlaps,[22] preemption is unwarranted here even if the Commission were to conclude that it possesses the power to preempt the state orders.

A. The State PSCs' Orders Are Not Preempted By The *Triennial Review Order*.

BellSouth's principal claim is that the state commission orders it attacks are preempted by the Commission's *Triennial Review Order*. BellSouth contends (at 10) that the "Commission

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[22] The Commission has expressly refused to preempt state regulation of jurisdictionally mixed services when, for example, it has not found a pressing policy need supporting uniform federal regulation over those services. *See, e.g., In re Furnishing of Customer Premises Equip. by the Bell Operating Tel. Cos. & the Independent Tel. Cos.*, 2 FCC Rcd. 143, ¶¶ 121-29 (1987) (declining "for policy reasons" to exert jurisdiction over service provided by certain carriers that "supports both interstate and intrastate communications"), *pet. for review denied, Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *In re Filing & Review of Open Network Architecture Plans*, 4 FCC Rcd. 1, ¶¶ 276-80 (1988) (declining to preempt state regulation in order to "balance the need for federal guidance in specific areas against the possibility of inefficient or disruptive effects on present [state] regulatory policies"), *pet. for review denied, State of California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689 (1999) (declining to preempt state actions affecting jurisdictionally mixed ISP-bound traffic).

established in the *Triennial Review Order* that states may not impose unbundling obligations that this Commission has considered and rejected." BellSouth then claims that these states required it separately to unbundle the low-frequency portion of its loops, an unbundling requirement that the Commission rejected in the *Triennial Review Order*. Both assertions are false.

First, the Commission stated unequivocally in its brief defending the *Triennial Review Order* that it most certainly "did *not* preempt states from adding to the unbundling requirements that the FCC adopted." FCC *TRO* Br. at 91 (emphasis in original). Rather, the Commission merely observed that "in at least some instances" state unbundling requirements may be preempted and expressed its willingness to entertain "fact-intensive" showings by "[p]arties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C)." *Triennial Review Order,* at ¶¶ 192, 195. Moreover, the Commission stressed that states have quite broad discretion in this area, noting that "state interconnection and access regulations must '*substantially prevent*' the implementation of the federal regime to be precluded and that 'merely an inconsistency' between a state regulation and a Commission regulation was *not* sufficient for Commission preemption." *Id.* ¶ 192 n. 611 (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997), *rev'd in part on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Second, none of the state commission determinations BellSouth challenges required it separately to unbundle the low-frequency portion of its loops. BellSouth's entire argument is predicated on its assertion that, in acting under state law to protect disfavored retail local telephone *consumers* from BellSouth's discrimination, these states have imposed a wholesale unbundling requirement. None of the state orders at issue did anything of the sort. Each state PSC merely required that BellSouth not penalize local telephone customers that would like to exercise competitive choices. No state purported to create any new UNE, and no state purported to require BellSouth to provide the low frequency portion of its loops to CLECs on an unbundled basis.

To the contrary, and consistent with the *Triennial Review Order*, CLECs in each of these states remain obligated to secure and pay for the *entire* loop. The PSC orders in question addressed only BellSouth's continuing obligation to provide DSL service to those customers. BellSouth confirms this in the heading of its own petition that initiated this proceeding. *See* BellSouth Pet., at cover (seeking declaration that BellSouth needn't provide DSL services "to CLEC UNE voice customers").[23] And in the proceedings before the state commissions and reviewing courts BellSouth argued (unsuccessfully) that it had no legal right to comply with those state orders, because it had, in each case, transferred control of the *entire* loop to the requesting CLEC. Indeed, BellSouth acknowledges here (at 29-30) that the CLEC must lease (and pay for) the entire loop and that the state requirements apply to the "unbundled loop," not to any new state-law low-frequency sub-loop UNE.

BellSouth thus delivers a complete *non sequitur* when it claims (at 14) that the Commission has "held, as a matter of national policy that the low-frequency part of the loop is not a UNE, or, put differently, that ILECs have no obligation to continue to provide DSL services to CLEC UNE voice customers." The Commission declined to unbundle the low frequency portion of the loop, which had the practical effect of requiring all CLECs, including voice-only CLECs, to secure and pay for the entire loop rather than to pay what would be a far lower price

[23] The absence of any requirement separately to unbundle only a subset of loop capabilities is confirmed by the fact that states such as Florida may permit BellSouth to continue to provide DSL service to a customer over a different loop from the one the CLEC uses to provide telephone service.

for only the low frequency portion of the loop. None of the challenged state determinations imposes any contrary obligation, enables any CLEC to secure and pay for only a subset of loop capabilities, or otherwise creates any line-sharing or other UNE obligation. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 394 ("The dictionary definition of 'unbundle[d]' ... matches the FCC's interpretation of the word: 'to give separate prices for equipment and supporting services.'") (quotation omitted).

Once BellSouth's manufactured "unbundling" inconsistency claim is brushed aside, it is clear that BellSouth has no possible claim that the state-law requirements are preempted by the *Triennial Review Order* for the simple reason that the *Triennial Review Order* did not purport to authorize incumbent LECs to turn off (or refuse to provide) DSL service to customers that switch to another local telephone provider. BellSouth points out that CompTel brought this anticompetitive practice to the Commission's attention in the *Triennial Review* proceeding, but as the very passage of the *Triennial Review Order* that BellSouth quotes makes clear, the Commission's *only* ruling was that the existence of the practice was not enough to justify separate unbundling of the low frequency portion of the loop in line sharing arrangements. *Triennial Review Order*, at ¶ 270. The Commission did not say anything about the reasonableness or lawfulness of BellSouth's practices, much less the propriety of restrictions on those practices imposed by sovereign states, in the exercise of core police powers expressly preserved by the Communications Act. BellSouth can point to no part of the *Order* that holds otherwise.[24] Indeed, the Commission has not even ruled out the possibility that BellSouth's

[24] Section 251(d)(3) bars the FCC from "preclud[ing] the enforcement" of any state access order as long as it is "consistent with the requirements" of § 251 and "does not substantially prevent implementation of the requirements of this section and the purposes of this part." Even if some Commission order had, implausibly, purported to establish a federal policy of *fostering* BellSouth's refusal to provide DSL service to CLEC telephone customers, the PSC policy would

anticompetitive practices violate *federal* law: "if AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with . . . the Act itself, we encourage AT&T to pursue enforcement action." *Line Sharing Reconsideration Order*, 16 FCC Rcd. 2101, ¶ 26 (2001).[25]

For that reason, BellSouth ultimately retreats (at 15) to policy-based preemption arguments. Specifically, BellSouth contends that the challenged state orders interfere with a "core polic[y]" in which the *Triennial Review Order* is "grounded" – *i.e.*, "the need to preserve incentives to engage in facilities-based competition." Even if true, that would not state a conflict preemption claim. *See, e.g.*, *Hillsborough County, Fla. v. Automated Labs., Inc.*, 471 U.S. 707, 720 (1985) (court will not find state law preempted based on "speculative" claim of conflict with federal policy).

In any event, the state orders at issue deal with BellSouth's obligations to customers that purchase voice services from UNE-based CLECs that provide those services over *BellSouth's* facilities. There is thus nothing in those state orders that could even arguably impede "facilities-based competition." Indeed, if anything, it is BellSouth's discrimination against CLEC voice customers that impedes facilities-based competition. BellSouth's policy applies even to

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remain consistent with *section 251's* requirements and would not "substantially prevent implementation" of any relevant statutory requirement.

[25] The Commission's brief reference to BellSouth's DSL practices in a section 271 Order further confirms that no federal rule governs BellSouth's restrictive practice and that federal rules do not preclude additional regulation of the practice. The Commission rejected objections to granting relief under section 271 because, given the evidence before it, it did not find the "tying" of DSL and telephone services to violate the federal prohibition against discrimination and "because, under our rules, the incumbent LEC has no obligation to provide DSL service over competitive LEC facilities." *Georgia-Louisiana Order*, 17 FCC Rcd. 9018, ¶ 157 (2002). This conclusion, however, does not suggest that federal law *shields* the restrictive practice from state regulation and simply summarized the current state of regulation set forth in the *Line Sharing Order*. As noted there, the FCC expressly concluded that additional regulation was consistent with its rules.

customers that would secure voice telephone service from a facilities-based CLEC (*e.g.*, through UNE-L or sub-loop unbundling), and thus impairs facilities-based competition by locking in those customers and walling them off from facilities-based competition.

BellSouth also claims (at 16) that the state orders could impede "innovative line-splitting arrangements," such as the arrangements recently announced between Covad and AT&T and MCI. As the Commission made clear in the line-sharing portion of the *Triennial Review Order*, however, the relevant incentive depends upon whether the CLEC must pay for the entire loop, and then try to secure revenues to justify the expenditure, or is entitled (*e.g.*, through line-sharing) to secure and pay for less than the entire loop. *See Triennial Review Order*, at ¶¶ 260, 263. Where, as under the state orders, the CLEC must pay for the entire loop, it plainly has the incentive the Commission envisioned to seek out line-splitting arrangements. Indeed, because BellSouth retains the full DSL revenues and earnings under the state orders, the CLEC has an unusually great incentive to convince the customer to accept an alternative DSL provider (who directly or indirectly adds to the CLEC's earnings). But, as detailed above, the unfortunate reality is that line-splitting arrangements will not for the foreseeable future be available in all areas or for all customers.[26] And the fact that the CLECs are actually seeking to pay for the entire loop but to have BellSouth continue to provide DSL service is testimony to the anticompetitive barrier imposed by BellSouth's restrictive practice. The state orders simply permit the CLECs to have the opportunity to compete on the merits initially for voice telephone service, free of the lock-in effect imposed by transition costs, and BellSouth points to nothing that would reduce the CLECs' incentive to have customers accept an alternative DSL provider once the customer converts to the CLEC's voice telephone service.

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[26] *See* Declaration of Sarah DeYoung (Attachment A).

In any event, line-splitting arrangements such as those AT&T and MCI have entered with Covad are inherently constrained by limits on the geographic scope of DSL service providers' offerings,[27] by scaleability limits on rolling out alternative DSL services, and by FCC rules that prevent CLECs from offering DSL over the already very substantial and growing number of hybrid fiber-copper loops. As the record in Florida demonstrated, "[a]lthough, BellSouth claims that the CLECs have options for providing their own DSL service, it is clear from the record, that as a practical matter, these are not reasonable, viable options." *Florida Staff Recommendation*, No. 020507-TL, at 44.[28]

Finally, there would be no merit to BellSouth's *Triennial Review Order* preemption claim even if, contrary to fact, the challenged state orders did require unbundling. As noted, the *Triennial Review Order*'s discussion of preemption expressly stated that preemption would arise only where state orders ""substantially prevent' the implementation of the federal regime," *Triennial Review Order,* ¶ 192 n.611 (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806), and preemption would exist only if a federal policy were "negated" through a clear inconsistency with federal law. *See NARUC,* 880 F.2d at 428-29; *cf.* 47 U.S.C. § 252(d)(3).

The history, terms, structure, and purposes of the 1996 Act make it explicit that section 251 and the FCC's implementing regulations are minimum requirements that establish a federal "floor" and that states can impose additional unbundling obligations under state law. The 1996 Act was enacted against the background of the states' historic *exclusive* jurisdiction over local and other intrastate telecommunications under § 2(b) of the Communications Act, 47 U.S.C.

[27] *See id.*

[28] *See also Georgia PSC Order*, No. 11901-U, at 7-8, 17 (finding alternatives such as resale, cable modems, CLEC DSL service and line splitting effectively unavailable, and that "the

§ 152(b). Many states had exercised this power by prohibiting competitive local services, but other states were increasingly using their jurisdiction to impose unbundling requirements analogous to those authorized by § 251. When federal law enters into an area previously subject to state police power regulation, there is a particularly strong presumption that Congress did not mean to oust state law. *See Cipollone*, 505 U.S. at 518.

Rather than displace state authority generally, the 1996 Act expressly preempts only state law entry barriers, *see* 47 U.S.C. § 253(b), and contains four separate savings clauses that authorize states to enact or enforce additional procompetitive requirements under state law so long as they do not "lower" the federal floor. *See* 47 U.S.C. §§ 251(d)(2), 252(e)(3), 261(c), Act § 601(c)(1), 110 Stat. at 143; *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent").

The 1996 Act is therefore analogous to the numerous other federal statutes that place a floor under state regulation of the same subjects but not a ceiling above them.[29] These decisions recognize the general principle that "a state or locality's imposition of additional requirements

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alternatives to BellSouth's DSL service do not substantially diminish the anticompetitive impact of BellSouth's policy on local voice competition").

[29] *See, e.g.*, *Atherton v. FDIC*, 519 U.S. 213, 216 (1997) ("We conclude that state law sets the standard of conduct as long as the state standard (such as simple negligence) is stricter than that of the federal statute. The federal statute nonetheless sets a 'gross negligence' floor, which applies as a substitute for state standards that are more relaxed."); *Old Bridge Chems., Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992) ("[A]lthough waste management may be an area of overriding national importance, in legislating in this field Congress has set only a floor, and not a ceiling, beyond which states may go in regulating the treatment, storage, and disposal of solid and hazardous wastes."); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1454 (6th Cir.1991) ("CERCLA sets only a floor, not a ceiling, for environmental protection. Those state laws which establish more stringent environmental standards are not preempted by CERCLA."); *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 295 n.8 (3d Cir. 2003) (Older Workers Benefit Protection Act "was enacted to establish a floor, not a ceiling") (internal quotation marks and alterations omitted).

above a federal minimum is unlikely to create a direct and positive conflict with federal law." *Southern Blasting Servs., Inc. v. Wilkes County, N.C.*, 288 F.3d 584, 591 (4th Cir. 2002).

Here, of course, there is no possible claim of a direct and positive conflict with federal law. As addressed more fully above, none of the federal policies BellSouth identifies is thwarted by the state orders. Rather, the state orders are intended to – and do – serve the 1996 Act's core objective of promoting local telephone competition.[30]

B. The State PSCs Have Ample Power To Impose Marketing Restrictions that Affect Retail DSL Services Even If Those Services Are Information Services.

BellSouth next claims (at 19) that "[t]he Commission has precluded state regulation of interstate information services" and thus has preempted any state regulations affecting retail DSL services. This, too, is false. As the courts of appeals have consistently required, the FCC's preemption of state law regulation of information services has been limited and constrained, and certainly does not extend to the state commissions' regulation of jurisdictionally mixed services to prevent the anticompetitive practices at issue here.

BellSouth grossly mischaracterizes the controlling decisions. In *California I*, the authoritative case in this area, the court of appeals applied the controlling principles of *Louisiana PSC* and *NARUC*, outlined above, to jurisdictionally mixed information services and preserved broad state regulatory powers over such services. There, the court set aside FCC orders that purported to "preempt[] nearly all state regulation of the sale of enhanced services," 905 F.2d at 1235, and, in doing so, it rejected the same overbroad preemption arguments that BellSouth presses here. For example, *California I* expressly rejected arguments that section 2(b), which

[30] Moreover, the Commission based its rejection of the low frequency UNE on its predictive judgment about the availability of line splitting, and, as detailed above, the state commissions' records demonstrate that line-splitting is effectively unavailable in much of BellSouth's region.

preserves the states' exclusive power to regulate intrastate communications, did not preserve a state role with respect to information services. *Id.* at 1240. Contrary to BellSouth's claim (at 20), that decision did not involve or determine just regulation of "purely intrastate service." In fact, the court expressly rejected the argument, repeated by BellSouth here, that because intrastate and interstate communications are both affected by any state regulation, broad preemption was warranted. *See California I*, 905 F.2d at 1240. And that conclusion applied even though – unlike here – the Commission had already purported expressly to preempt certain state practices. Indeed, *California I* held that state regulation is entirely proper even when it affects interstate communications unless the Commission issues a preemption order "narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *California I*, 905 F.2d at 1243 (emphasis in original).[31]

Moreover, as discussed above, courts of appeals have specifically rejected BellSouth's arguments as applied to ISP-bound traffic. In *Southwestern Bell*, 208 F.3d 475, the Fifth Circuit held that the states could regulate this traffic, including interstate traffic, for charging purposes pending implementation of a controlling federal rule, and it would have been a pointless exercise for the court to hold that states could regulate the charges for the traffic when they were precluded from regulating the ISP service that generated the traffic. *See also Michigan Bell*, 339 F.3d at 443.

[31] The states clearly regulate other information services as well. For example, dozens of states have laws regulating e-mail (often commercial spamming) in one way or another. *See* http://www.spamlaws.com/state/index.html (summarizing state laws) (visited Jan. 30, 2004). Other states have enacted privacy laws that directly regulate the manner in which Internet Service Providers handle and maintain confidential information. *See, e.g.*, 2002 Minn. Sess. Law, Ch. 395, art. I, §§ 1-11, *codified at* MN St. § 325M.01-11.

The Commission's regulations addressing information services also reflect *California I*'s broad protections for state regulation of mixed jurisdiction information services and thus contradict BellSouth's claim. In the *Cable Modem Ruling*, the Commission determined that the high-speed Internet access service provided by cable television providers is an information service, and, in the *Broadband NPRM*, the FCC tentatively reached the same conclusion with respect to DSL service. *See Cable Modem Declaratory Ruling and NPRM*, 17 FCC Rcd. 4798, ¶ 33 (2002) ("*Cable Modem Ruling*"), *vacated and remanded in part, Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019, ¶ 13 (2002) ("*Broadband NPRM*"). In both orders, however, the Commission recognized that the information service regulatory classification carries with it no automatic preemptive consequences. *E.g.*, *Cable Modem Ruling* at ¶ 96. Accordingly, the Commission sought comment on "*whether* we should use our preemption authority to preempt specific state laws or local regulations." *Id.* ¶ 99 (emphasis added); *id.* ¶ 97; *see also Broadband NPRM,* at ¶ 62. The Commission thus explicitly recognized that preemption could not be inferred from the fact that the state regulation impinged on the provision of an information service containing interstate components.

Even where the Commission has acted to preempt state regulation of information services, it has done so in very limited fashion and only to preclude states from "impos[ing] common carrier *tariff* regulation on a carrier's provision of enhanced services." *Computer II*, 88 F.C.C. Rcd. at ¶ 83 n.34. It is clear that the state commission orders at issue here do not amount to "common carrier tariff regulation" of BellSouth's DSL service. The Louisiana PSC, for example, unequivocally "affirm[ed] that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service and does not establish any pricing for BellSouth's DSL."

Louisiana PSC Order, No. R-26173, at 12, 15; *see also Florida PSC Staff Recommendation*, No. 020507-TL, at 15; *Florida PSC FDN Order*, No. PSC-02-0765-FOF-TP, at 11. *Computer II*'s reference to "common carrier *tariff* regulation" emphasizes that the Commission's prior preemptive orders were directed at regulation of pricing and entry requirements, which the PSC orders at issue do not purport to undertake.

BellSouth claims (at 24) that the PSCs are engaging in "public utility regulation" because the state orders "tell BellSouth to whom it must offer its services (*i.e.*, CLEC UNE voice customers) and on what terms (*e.g.*, with only minimal disruption, at the same rates as BellSouth voice customers, etc.)." BellSouth, itself a rate-regulated monopoly utility, knows full well that the limited restriction imposed by the PSC bears no resemblance to the panoply of "common carrier tariff regulation" and "traditional public utility regulation."[32] The states have imposed no entry restrictions, no tariffing requirements, no pricing determinations, and no oversight of general retail practices. BellSouth may set its prices and has itself chosen to make generally available offers. The states have required only that BellSouth may not thereafter discriminate against *particular* DSL customers on the ground that the customer has selected a local service provider other than BellSouth. The states would no more be engaged in "traditional public utility regulation" or "common carrier tariff regulation" if they prohibited BellSouth from discontinuing or refusing to initiate DSL service upon discovering that a customer was of a particular race,

[32] The limited requirement imposed by the state commissions on BellSouth's DSL service pales in comparison to the common carrier regulation imposed by the Minnesota PUC, and upon which BellSouth principally relies (at 21-22). *See Vonage Holdings Corp. v. Minnesota Pub. Util. Comm's*, No. 03-5287, 2003 WL 22567645 (D. Minn. Oct. 16, 2003) (permanently enjoining Minnesota PUC, on federal preemption grounds, from imposing telephone common carrier regulation on information service provider). Whereas in *Vonage* the Minnesota PUC attempted to subject Vonage to broad common carrier obligations related to entry requirements, service oversight, and public service obligations, the state commissions have attempted no such thing with respect to BellSouth's FastAccess service.

political party, or religious affiliation. The states are empowered to foster local telephone competition, and nothing in the FCC's regulations or policies limits such pro-competitive actions.

In all events, it is now far from clear that even the predicate of BellSouth's argument – *i.e.*, that its retail DSL service is an information service – can be sustained. The Ninth Circuit has determined that cable modem services are comprised of both an information service and a telecommunications service, and cable modem service is indistinguishable from DSL service for this purpose. *See Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (review pending).

C. The State Commission Orders Are Consistent with Tariff Requirements.

BellSouth argues (at 27-30) that the federal tariff regarding its *wholesale* DSL offering preempts the state orders at issue by creating a conflict between the tariff's terms and the orders at issue, including the three orders that address BellSouth's *untariffed retail* service provision. This claim is also baseless.

The most basic flaw in BellSouth's argument is that its tariff and the Commission orders it cites all address exclusively wholesale services, but the state orders at issue focus instead on *untariffed* retail services. Whatever the preemptive scope of a wholesale tariff, it certainly doesn't extend to the wholly separate, untariffed retail service. BellSouth seeks (at 27) to avoid the fact that the *GTE Tariff Order* addressed only wholesale services by arguing that the wholesale tariff preempts state regulation of "(1) wholesale tariffed DSL services (as in Kentucky) or (2) as to BellSouth's retail DSL-based Internet access service, as to which wholesale DSL transmission is an input." Not only did the Kentucky PSC justify its *Order* based on the anticompetitive effect that BellSouth's practices had on the retail market, but a federal judge has squarely rejected BellSouth's argument and upheld the Kentucky order as a legitimate effort to forestall anticompetitive practices.[33] As to BellSouth's latter argument, the Florida, Louisiana, and Georgia PSCs rested their orders directly and entirely on the anticompetitive effect of BellSouth's practices on the retail telephone market. For each of the state orders that BellSouth challenges, BellSouth's argument regarding how its wholesale service is an input into its retail service is true but irrelevant. No retail service tariff exists, and the wholesale tariff cannot magically transform itself into a retail tariff simply because BellSouth uses its wholesale service as an input to its retail service. In any event, BellSouth can point to nothing in the state orders that presents a "conflict" between state requirements related to retail practices and its wholesale tariff terms, or that otherwise conflicts with the administration of the wholesale tariffs.

As to the Kentucky order's treatment of BellSouth's wholesale practices, there is again no conflict between the state requirement and the tariff's terms. BellSouth's tariff does not concern or refer even once to BellSouth's retail practices that were the focus of the Kentucky PSC's competition concerns, but instead states that "BellSouth ADSL service is intended as an industrial offering that is made available to Network Service providers for provision of high speed data service to their customers . . . ." *BellSouth Telecomms. Inc.*, Tariff F.C.C. No. 1, § 7.2.17(A) (May 31, 2002) ("BellSouth Tariff") (emphasis added). Because the Kentucky order focused on BellSouth's retail practices and their effect on retail competition, the tariff simply does not address the same subject matter as the PSC's order. And where the state commission

[33] *See BellSouth v. Cinergy*, 2003 WL 2313941 (appeal filed). Not only is there no basis for the FCC to reach any different decision than the federal court did, but the appropriate method for any divergence from the Court's authoritative construction of the Communications Act as applied to the Kentucky PSC Order would be to intervene in any challenge to the District Court's order on appeal. *See Brand X Internet Servs.*, 345 F.3d at 1133-34 (binding effect of judicial interpretation on agency); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1998) (same); *Neal v. United States*, 516 U.S. 284 (1996).

regulates a subject matter not addressed by the federal tariff, there can be no federal preemption. *See Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 711 (5th Cir. 1999) (PUC action not preempted by federal tariff where "[i]t does not concern the provision of services which are covered by the filed tariff, but rather . . . actions outside the scope of the tariff").

More fundamentally, even if the Kentucky order were construed as addressing actions within the scope of the tariff, BellSouth can still establish no conflict between the Kentucky order's terms and the tariff's terms. BellSouth's argument relies solely on the tariff language that BellSouth will provide service to an "end-user premises" that is serviced by an "existing, in-service, Telephone Company *provided* exchange line *facility*." BellSouth Tariff § 7.2.17(A). That definition is clearly met where the Kentucky PSC requires BellSouth to provide DSL service. The most natural reading of this language is that BellSouth will offer DSL transport service over its own existing, active facilities. That is, it will not offer the service over facilities built, owned, and maintained by other carriers (such as neighboring incumbent carriers) and will not offer the service over inactive facilities. This reading is reinforced by the definition of an "in-service exchange line facility," which is the Central Office line equipment and all plant facilities up to the network interface device (which are clearly owned and provided by BellSouth, not a competitive carrier). *Id.*

All a CLEC secures through BellSouth's provision of UNE-P is, for a distinct period and pursuant to a contract, the right to use the relevant BellSouth-provided line. BellSouth retains the ownership of the line, including obligations to maintain and repair it and the ability to account for it as an asset (and depreciate it in the income statement). That is, it remains a BellSouth-"provided exchange line facility." Indeed, BellSouth does not dispute that it provides

UNE-P services to competitive carriers over its facilities, which necessarily requires that BellSouth is continuing to provide its facility no matter what services it supports.

In fact, when it suits their interests, BellSouth and the other Bells have touted and relied upon the fact that UNE-P lines leased to a competitive carrier continue to be facilities provided by the Bell. Verizon is currently seeking to have the Commission permit it to collect the exchange access charges that long distance carriers pay to complete calls over UNE-P lines. This change is justified, Verizon argues, because the RBOC is the "underlying facilities provider" and "the entity actually providing those services" for such UNE-P lines. *Petition for Expedited Forbearance of the Verizon Tel. Cos.*, WC Docket No. 03-157, at ii, iii (filed July 1, 2003). BellSouth subsequently endorsed Verizon's petition and its reasoning. *See Joint Petition of Qwest Corp., BellSouth Telecomms., Inc. and SBC Communications Inc. for Expedited Forbearance* (filed July 31, 2003); *id.* at 3 ("The reasoning and factual arguments set out in the *Verizon Petition* apply equally to each of the joint petitioners."). BellSouth cannot now plausibly argue that one of its lines subject to UNE-P leasing is not a BellSouth-"provided exchange line facility." BellSouth Tariff § 7.2.17(A).

Even if the tariff's terms were not perfectly clear and consistent with the Kentucky order's requirements (and with BellSouth's own understanding expressed in the forbearance proceeding), any ambiguity in the tariff must be resolved against BellSouth.[34] This established principle of law protects the public against the harshness of the filed tariff doctrine.[35] If

[34] In other contexts, the FCC has recognized that the term "provide" can be ambiguous. *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 21438, ¶ 28 (1998) ("We conclude that . . . the term 'provide' is ambiguous").

[35] *See Norfolk & W. Ry. v. B. I. Holser & Co.*, 629 F.2d 486, 488 (7th Cir. 1980) ("'tariff[s] should be construed strictly against the carrier since the carrier drafted the tariff'"); *Bell Atl.-Del. Corp. v. Global Naps, Inc.*, 15 FCC Rcd. 5997, ¶ 22 (2000) ("ambiguous tariff provisions must

BellSouth truly wanted to affect the scope of its wholesale offering to third parties (and subject it to challenge under sections 204-05), then BellSouth must rewrite its tariff to express clearly this counter-intuitive and anticompetitive outcome. And if BellSouth ever attempts to do so, the Commission should itself suspend and investigate the reasonableness of the anticompetitive practice the states have rightly condemned.

The preemptive force of federal tariffs is, in all events, much less restrictive than BellSouth suggests. The tariff operates as federal law, and to that extent can preempt *inconsistent* state regulations just as a regulation or statute can. But nothing in that preemptive scope suggests that preemption operates in the absence of a conflict between state and federal requirements. Even the decisions that BellSouth cites (at 27 n.28) establish that preemption requires the identification of a conflict between a core tariff term and a contrary state requirement that actually burdens the carrier that files the tariff. While a tariff's terms may preempt state orders that have the effect of setting rates or imposing liability in a manner that indirectly amounts to a regulation affecting rates or other key terms,[36] the state orders here have no such affect on BellSouth's wholesale tariff.

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be construed against the drafting carrier"), *aff'd*, 247 F.3d 254 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002); *Halprin, Temple, Goodman, & Sugrue v. MCI Telecomms. Corp.*, 13 FCC Rcd. 22568, ¶ 13 (1998); *Associated Press*, 72 FCC.2d 760, ¶ 11 (1979); *Commodity News Servs., Inc. v. Western Union Tel. Co.*, 29 FCC 1208, 1213, *aff'd*, 29 FCC 1205 (1960).

[36] *See AT&T Co v. Central Office Tel., Inc.*, 524 U.S. 214 (1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir. 1998); Order on AT&T Motion to Expand Investigation, *Investigation by the Department of Telecommunications and Energy on Its Own Motion Pursuant to G.L. c. 159, §§ 12 & 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services*, D.T.E. 01-34, 2001 Mass. PUC LEXIS 94, at *16 (Mass. D.T.E. Aug. 9, 2001); New York Pub. Serv. Comm'n Press Release, *PSC Strengthens Verizon's Service Quality Standards for "Special Services"* (May 23, 2001).

Contrary to BellSouth's claims (at 26), the *GTE Tariff Order*[37] does not help BellSouth even with respect to states' regulation of wholesale practices. That order reflected a simple determination that wholesale DSL services were comprised of sufficient interstate traffic for the Commission to assert its jurisdiction to accept and review tariffs in relation to that service. The Commission did not determine the scope of any preemption, did not assert that its jurisdiction was exclusive with respect to state regulation not in conflict with the tariff's terms, and expressly declined to address any issue related to preemption. *See* 13 FCC Rcd. at ¶ 28.

Nor can any purported interest in uniformity justify preemption. BellSouth's wholesale tariff applies without variation throughout the region, but BellSouth claims (at 28) that "there will be no single federally tariffed service" because it must provide its FastAccess service to end users over CLEC UNE lines in some states but can disconnect the service in others. The "burden" of requiring BellSouth to serve DSL customers it would otherwise serve (but for the anticompetitive effects of its practice) is hardly a variation in the nature or pricing of its wholesale service offering that the tariff protects, any more than the tariff would protect claims that it was declining to deploy its DSL service based on any other basis prohibited by state law. Instead, certain states have found BellSouth's practice to be anticompetitive, and any state-based variance in result is precisely what is inherent in the Congressional mandate to state commissions in their regulation of intrastate communications.

In short, there is no conflict between the state orders and BellSouth's wholesale tariff. While the authorization of federal tariffing authority may lead to displacement of state regulation that is clearly contrary to the tariff itself, the states' orders – most clearly the orders addressing

[37] Order, *GTE Tel. Op. Cos.,* 13 FCC Rcd. 22466 (1998).

BellSouth's retail services but also the Kentucky order addressing wholesale practices – are fully consistent with BellSouth's tariff and thus not preempted.

CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's "Emergency Request for Declaratory Ruling."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2004, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: January 30, 2004
Washington, D.C.

/s/ Peter M. Andros
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* Filed electronically via ECFS

Attachment A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
BellSouth Telecommunications, Inc.	)	
Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	)	**WC Docket No. 03-251**

DECLARATION OF SARAH DEYOUNG

1. My name is Sarah DeYoung. I am Division Manager - Local Performance and Cost Management for AT&T's Local Services and Access Management ("LSAM") Organization. In my position, I and members of my team are responsible for the business relationship with BellSouth Corp. as it relates to supporting AT&T's plans for providing local telephone service in the BellSouth region.

2. My responsibilities also include managing the business relationship between AT&T and BellSouth for all local issues. AT&T is currently providing local exchange service through the UNE platform ("UNE-P") to residential and business customers in all nine BellSouth states.

3. The team that I currently manage interfaces with internal AT&T operational teams dedicated to provisioning AT&T local services. In AT&T Consumer Services, for example, our primary stakeholders include the Product Management organization, which oversees the bundled local product that AT&T is offering in

BellSouth States. My team also partners with the CIO systems organization that manages the integrated systems platform and interfaces with BellSouth and other external suppliers (such as vendors of inside wire and providers of voice mail).

4. I hold a Bachelor of Arts degree from the University of Michigan in Ann Arbor, and a Master of Management degree from the Kellogg School of Business at Northwestern University. I have been with AT&T since 1982. In the course of my career, I have worked in various local exchange supplier management positions and in a wide variety of engineering and finance positions. I have worked on AT&T's local market entry plans since 1995. In 1995 and 1996, I managed the local service relationship with Ameritech. In late 1996, I accepted the same responsibilities for Pacific Bell Telephone Company. In 1999, I became responsible for all of the SBC states, including the SWBT states, and in the summer of 2003, I became responsible for all of the BellSouth states as well. For all of these territories, I am responsible for supporting the team that negotiates AT&T's interconnection agreements with BellSouth and SBC, am the primary contact for all operational issues affecting the companies, and provide subject matter expertise on a number of local issues.

5. The purpose of this Declaration is to address the effect of BellSouth's policy to deny its DSL internet service to CLEC voice customers, respond to claims that AT&T has viable alternatives to compete with BellSouth DSL service, and address the shortcomings of BellSouth's proposed procedures to provide its DSL service to CLEC voice customers in light of recent state commission orders requiring such DSL service.

Anticompetitive Effect of BellSouth's Tying Arrangement

6. As BellSouth readily concedes, it maintains a policy to deny DSL service to CLEC voice customers. BellSouth both refuses to allow CLEC voice customers to obtain BellSouth DSL service, and discontinues DSL service to its customers who switch voice service to a CLEC. BellSouth's policy in this regard has a substantial impact in "walling off" its voice customers from competition.

7. AT&T Customer Service representatives monitor why customers and potential customers choose local service from another carrier. In November 2003, AT&T Consumer Service representatives reported that over 1,700 RBOC customers indicated that they would not switch to AT&T's voice service specifically because they would lose their current RBOC DSL service. These customers had been walled off from local voice service competition because BellSouth and other RBOCs refused to allow the customer to obtain RBOC-provided DSL service and CLEC voice service.

8. The 1,700 figure reported by AT&T's Customer Service representatives actually understates the potential anticompetitive effect of BellSouth's refusal to provide DSL service to CLEC voice customers. First, this figure does not include the number of business customers that declined to switch providers because they would lose their current DSL service, which could be expected to be at least equal to, if not greater, than the number of consumer customers who would not want to lose their existing DSL service. Second, this figure excludes the many customers who did not give any reason for not switching local service. Finally, this number does not include those customers who did not contact a service representative at all simply because they knew they would lose their RBOC DSL service. But the reported instances alone indicate that BellSouth's

policy of tying its voice service to its provision of DSL service has had significant anticompetitive effects on the local telephony market.

9. In addition, AT&T is without any viable alternative to compete with BellSouth's DSL service and is unable to provide DSL service to the vast majority of BellSouth DSL customers. AT&T has entered into a joint venture with Covad Communications to provide DSL service. Despite the best efforts of both parties, however, this joint venture falls far short of providing a viable alternative for DSL service to most BellSouth DSL customers. AT&T's DSL arrangements such as those entered with Covad are inherently constrained by limits on the geographic scope of DSL service providers' offerings, as well as by the limits on rolling out the DSL service.

10. In order to provide DSL service through a line splitting arrangement, AT&T will have to rely on Covad's current footprint. Currently, Covad (one of the few remaining DLECs) only has line splitting capabilities in a few metropolitan areas in some, but not all, BellSouth states. Thus, even if AT&T were able to maximize its DSL provision through Covad's line splitting capabilities, it would be on a limited basis and would not provide an adequate alternative to BellSouth's DSL service.

BellSouth's Onerous DSL Service Procedures For CLEC Voice Customers

11. In June 2002, the Florida PSC first ordered BellSouth to continue to provide its FastAccess DSL to end-users who obtain voice service from a CLEC. Since then, three other state commissions, Kentucky, Louisiana, and Georgia, have issued similar orders. BellSouth has effectively failed to comply with these orders. BellSouth's only proposed operational procedures are clearly designed to delay its provision of DSL service to CLEC voice customers. These requirements are intensely manual, delay

AT&T's ability to service its local voice customers, and increase the chance that AT&T's local orders will fail.

12. In order to comply with the state commission orders, AT&T has had to renegotiate its ICAs with BellSouth. Thereafter, AT&T must comply with BellSouth's convoluted ordering requirements in order to allow an AT&T voice customer to retain (or obtain) BellSouth DSL service.

13. AT&T must first issue the Local Service Request ("LSR") to the Local Carrier Service Center with DSL on the account. BellSouth, however, rejects all LSRs with DSL on the account. Instead, BellSouth requires AT&T to recontact the DSL customer and inform them they must contact their existing DSL Provider to change their ADSL service. AT&T is then required to compile a spreadsheet of the ADSL customer orders and hold them. Upon notification from BellSouth, AT&T updates and emails the spreadsheet with the affected customers to a designated contact at BellSouth. During this time, AT&T local voice orders remain on hold.

14. After receiving AT&T's spreadsheet, BellSouth has three business days to identify which customers have DSL service from BellSouth or other providers, to determine the method for providing FastAccess service for existing FastAccess customers, and to send a report back to AT&T.

15. After this delay, BellSouth then contacts the customer to review the new "terms and conditions" of FastAccess Standalone service. BellSouth has three consecutive business days to attempt to contact the customer. If BellSouth is unable to contact the customer, BellSouth then sends the information regarding the new "terms and conditions" in a letter within another five business day window.

16. BellSouth has not provided to AT&T a list of the "terms and conditions" under which it is willing to provide FastAccess Standalone service to the customer. But a cryptic reference in a footnote to a document describing the conversion process reveals that BellSouth plans to implement this requirement by taking every step to ensure that customers will never want to switch voice carriers. Specifically, footnote 1 of BellSouth's requirements document reveals that BellSouth intends to satisfy its obligations under the state orders by providing FastAccess service on a different loop than the UNE-P line. Thus, it will either continue to provide the FastAccess service on the existing line and provision UNE-P over a new line; or it will provide the UNE-P over the existing line and provision FastAccess service over a new line.

17. As a practical matter, provisioning DSL on a separate line completely undercuts the objective of the state orders because it ensures that customers will ultimately decide not to switch carriers. First, there is no reason (and certainly BellSouth has not even attempted to provide one) to require that the FastAccess service be provisioned on a separate line. And requiring a separate line increases the likelihood that DSL service will not be available, either because there may not be a spare pair available to serve the customer or because the new line on which FastAccess would be provisioned is not DSL capable.[1] Second, if the "new" line is the one over which voice service will be provided, AT&T will have to pay additional non-recurring charges associated with new UNE-P lines and will have to incur the costs of dispatching an inside wire vendor to

[1] Alternatively, finding a spare pair that is DSL capable may require BellSouth to rearrange either loop or port facilities, which in AT&T's experience, creates another whole set of problems, including service degradation.

complete the work. Third, the inside wire dispatch will require the customer to arrange to be home – all to retain a service that he could keep without hassle by simply not switching voice providers. Finally, provisioning the DSL service on a separate line will decrease its utility to the customer, as the standalone DSL service will not be provided on the customer's primary phone line. Therefore, the DSL service will only be available at a single jack and not simply in any room in which there is a phone jack.

18. As if these impediments were not enough, it is unclear whether the type of DSL that BellSouth would provide would be ADSL or IDSL. Converting the service to IDSL – a likely outcome – would have significant negative consequence for customers. For example, IDSL requires different end user equipment than ADSL requires, and would require the customer to install new equipment, or even if installed by the DSL provider, require the customer to be home for the installation.

19. Even in the unlikely event that the customer were to agree to these terms and conditions, BellSouth's order processing interval can take more than 30 days. Only then would AT&T finally receive notification from BellSouth that the service is complete. AT&T then must resubmit the original LSR for conversion to UNE-P, and hope that BellSouth will finally provision the service. Thus, BellSouth's requirements greatly increase the probability that AT&T's local service order will fail entirely at any point along the transfer.

Conclusion

20. In short, BellSouth has walled off a solid base of its voice customers from competition by tying its DSL service to its local voice service. Although AT&T has tried to develop a viable DSL alternative to BellSouth, current market conditions limit its

ability. Thus, in most instances BellSouth is the only DSL provider. And as discussed above, BellSouth's anticompetitive practices have stifled competition for local telephony.

VERIFICATION

I declare under penalty of perjury that the facts stated herein are true and correct, to the best of my knowledge, information, and belief.

/s/ Sarah DeYoung
Sarah DeYoung

Date: January 30, 2004